86-971

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. ROBERTSON,

Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
ROBERT A. KLECKNER
AND LARRY A. JOBE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a partnership may lawfully discriminate against personnel by excluding all employees from participation in a retirement plan? In other words, is a partnership plan which includes only partners a plan that is not subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) including ERISA's minimum standards of participation.

2. Whether a Labor Department regulation precludes application of ERISA to all partnership retirement plans for partners as a matter of law, where the regulation is contrary to the ERISA statute, where the regulation is contrary to the purpose and legislative history of ERISA, where the regulation has never been applied or tested by any court, and where the regulation is contrary to pre-ERISA Supreme Court constructions of similar legislation.

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CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix A hereto, *infra*, p. A-9. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. A-1, is reported in 798 F.2d 868.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 2, 1986. Rehearing was denied on September 30, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are printed in Appendix B, *infra*, pp. B-1 to B-9.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

James W. Robertson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 2, 1986.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because a question arises under a law relating to commerce, the Employee Retirement Income Security Act of 1974.

Alexander Grant & Company ("Alexander Grant") is a large national accounting firm which in 1974 employed 2,000 people including 300 people labeled "partners". Alexander Grant continues to be one of the ten largest accounting firms in the nation.

Alexander Grant has an unfunded retirement plan for partners and a nearly identical plan for nonpartners designated as "principals". All other personnel of Alexander Grant, including secretaries, clerks, bookkeepers, staff accountants, supervisors and technical personnel, are excluded from the retirement plan.

In a national accounting firm like Alexander Grant, the operation of the business is the same as it would be in a corporation of similar size. The Executive Committee of Alexander Grant has overall management of the partnership and its offices. The Executive Committee delegates the responsibility for the overall management of the firm to the Executive Partner. The Executive Partner appoints a managing partner for each individual office. Each individual office is operated under the established policies and procedures of Alexander Grant. The local organizations are tightly controlled, and the local partners have no more authority than an employee of a local office of a large corporation.

Each year an accounting firm such as Alexander Grant hires many college graduates. For each graduate hired, one person from higher levels of achievement has to leave the firm unless the business is expanding. If the economy is in recession and an individual office is contracting, more personnel will be terminated than hired. The situation is similar to the workers on an automobile assembly line in that the business follows the economic cycle. There is one important difference — in the accounting business, the ones terminated are not rehired when business activity resumes. With the exception of the secretaries, receptionists, bookkeepers and file clerks, this turnover keeps

repeating itself because it is the policy of accounting firms to hire newly graduated college graduates thereby forcing turnover at higher levels. This turnover is not limited to nonpartner personnel, but also includes partners. In Alexander Grant, the turnover of partners is approximately ten percent (10%) a year. For example, of the partners in the Dallas office in January, 1973, none of the partners were left in June, 1984.

Mr. Robertson was employed by Alexander Grant for over 19 years and was terminated in January, 1979. Mr. Robertson was in the retirement plan and requested his retirement benefits, which were denied him. Mr. Robertson brought suit, arguing that Alexander Grant's retirement plan was subject to ERISA and that his retirement benefits were vested and not forfeitable. The Fifth Circuit Court of Appeals affirmed the District Court's summary judgment, holding that the partnership retirement plan of Alexander Grant covered only partners and was not subject to ERISA. The Fifth Circuit further affirmed the summary judgment that the nearly identical plan for principals was a separate plan, notwithstanding the evidence offered to show that the plans were in fact the same.[1] The argument by Robertson that all eligible employees had to be included in the partners' retirement plan was not even mentioned in the opinion of the appeals court.

REASONS FOR GRANTING THE WRIT

This case presents an important and novel issue involving the interpretation and application of an act of Congress — ERISA. The intent of Congress, the legislative history and the structure of the Act have been disregarded in favor of a hastily

[1] A "principal" is a non-CPA for whom Alexander Grant arbitrarily provided a retirement plan using the same formulae and units of the so-called partners' retirement plan. The Fifth Circuit erred in holding that "however similar" the plans might be, they were two separate plans. While this error is not the major thrust of our reasons for granting the writ, it is worthy of consideration in demonstrating that the analysis below was faulted in yet other ways.

drafted regulation[2] by an unknown individual in the Labor Department to eliminate the protection of ERISA for an extremely large number of persons. This unknown individual has taken a well drafted statute and made it complicated by his initial mistake of interpreting the definition of "employee" in the statute[3] as being limited to common law employees. Congress long ago moved away from the "common law" definition of "employee" in the social legislation area.[4] The concept of earned or self employment income has been used to determine who is an "employee" in employment related contexts.[5] Using the earned or self-employment test, a working partner would be an "employee" for the purposes of ERISA.

After the regulation drafter's initial mistake, others have blindly followed him through the statute. As a result, "employee" defined in this manner hinders the effective administration of ERISA for its intended beneficiaries. If one does not start with this faulty assumption, the statute is simple and its meaning clear.

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[2] 29 C.F.R. § 2510.3-3(c)(2). "A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership."

[3] 29 U.S.C. § 1002(6). "The term 'employee' means an individual employed by an employer."

[4] See *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (National Labor Relations Act) and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (Fair Labor Standards Act).

[5] The term "employee" under Section 1002(6) of ERISA "means any individual employed by an employer". This is a broad definition which covers any individual who works or performs services. In other words, an individual who has earned income. This definition would include partners who perform services or self-employed individuals who perform services.

Congress could have chosen the definition of "employee" from I.R.C. § 1402(d) (26 U.S.C. § 1402(d), Tax on Self-Employment Income) which covers only common law employees. However, Congress chose a definition of "employee" that could cope with the modern day business environment that was similar to the definition in I.R.C. § 401(c) (26 U.S.C. § 401(c)). In Section 401(c), "the term 'employee' includes . . . an individual who has earned income for the taxable year." Earned income is then defined as net earnings from self-employment under I.R.C. § 1402(a) (26 U.S.C. § 1402(a)). Congress was aware of the various definitions of "employee" and did not wish to restrict the definition to common law employees. Congress chose to cover all individuals that were earning income from their labor by using the word "employed."

Reading the policy statement of ERISA, considering the arrangement of the statute and reading the legislative history clearly demonstrates that partners in a partnership were meant to be covered by ERISA.

A. Policy and Objective of ERISA

ERISA was enacted to prevent the loss of retirement benefits after long years of service, to insure funding of the benefits and to assure the equitable character of retirement plans. 29 U.S.C. § 1001. ERISA accomplished this objective by establishing minimum standards of participation, vesting and funding of retirement plans. Assuring the equitable character or fairness of the retirement plan was the primary objective of the minimum participation standards. *Id.* With such an objective, why would Congress exclude partnership plans that covered only partners and excluded all other personnel? Why would Congress just want to cover corporate retirement plans? It seems the opposite should be true if Congress were making a choice as to fairness. Are not employees of partners less likely to be able to protect themselves than employees of corporations? What equity is there in allowing partners to have a retirement plan yet exclude the faithful employees who have contributed substantially to the success of the business?

Partnerships are an important part of industry and involve large numbers of workers. Partnerships are not limited to "mom and pop" operations, they are big business. In 1982, there were 1,514,212 partnership tax returns filed in the United States, of which 435,205 were in the finance and service sector. Internal Revenue Service, Department of the Treasury, *Statistics of Income Bulletin* at pp. 55-56, 86-87 (Fall, 1985). This affected 9,764,667 partners, of which 3,154,774 were in the finance and service sector. *Id.* The total business receipts of partnerships in 1983 were estimated to be $291,318,703,000. *Id.* A partnership on Wall Street was recently described as

having $3 billion in revenue with 6,000 employees. Wall Street Journal, October 9, 1986, at p. 1, col. 6 (Southwest ed.).

Partnerships cover all sectors of industry and are an important part of business. Why should there be any principal difference in retirement plans between businesses that are the same, except one is in the corporate form and the other is in the partnership form? ERISA is concerned with retirement plan fairness wherever retirement plans exist, be they in a corporation, a partnership or a sole proprietorship. Congress intended to cover partnership plans and, as such, Alexander Grant could not exclude the secretaries, the clerks, the staff, etc. that met the minimum standards of ERISA. Such an interpretation is not in keeping with the goals and the objectives of ERISA of assuring the equity and fairness of retirement plans.

B. The structure of ERISA indicates that "partners" are "employees" under ERISA and thus such retirement plans covered under ERISA.

The coverage of a partner under ERISA can be seen quite clearly if one examines the structure of the Act itself. An outline of the Act with excerpts of the relevant sections follows on pages 8-10 of this petition.

Referring now to the outline, "Subtitle A, General Provisions" provides general coverage under ERISA in Section 1003(a) and includes as well the exceptions to general coverage under Section 1003(b). Partners' plans are not excluded under Section 1003(b). The reader should next observe "Subtitle B-Regulatory Provisions" and its four parts — (1) reporting and disclosure, (2) participation and vesting, (3) funding and (4) fiduciary responsibility. There are additional exceptions of various kinds to coverage under participation and vesting, funding and fiduciary responsibility *but not* under the reporting and disclosure part. If a person met an exception under one of the parts, this person would still be subject to the parts not excluded. Of special interest are the exceptions of

Section 1051(5), Section 1081(6) and Section 1101(2) dealing with partners' distributions as described under Section 736 of Title 26. If a Section 736 partner distribution (buy-out) had to be *excluded* from the participation and vesting section, a Section 736 partnership "buy-out" must have been included in ERISA but for this exclusion. *Since common law employees cannot receive a "buy-out" payment of a partnership interest, ERISA in general has to cover distributions that are paid only to partners.* Thus, ERISA concerned partners and covered partners under the definition of "employees" under ERISA.

Section 736 concerns the "buy-out" or purchase of a partner interest in a partnership. A Section 736 payment is not the *only* type of payment that can be made to a partner. A payment could be made under a regular retirement plan, under I.R.C. § 704 (26 U.S.C. § 704) as a distributive share of income or under I.R.C. § 707(a) (26 U.S.C. § 707(a)) as a payment otherwise than as to a partner.

Since Section 736 "buy-out" payments to partners are specifically excepted from ERISA coverage of Part 2 ("Participation and Vesting"), Part 3 ("Funding"), and Part 4 ("Fiduciary Responsibility"), it follows that retirement payments to partners in general are covered by ERISA.[6] The Section 736 exceptions would be superfluous if all retirement payments for partners were excluded from ERISA *ab initio.* Thus, Congress intended to treat "partners" as "employees" under ERISA. In other words, why would Congress exclude a partners from only certain subsections of the Act if that partner were not to be covered by the Act in general?

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[6] *Expressio unius est exclusio alterius.*

Outline

Chapter 18 — Employee Retirement Income Security Program
Subchapter I — Protection of Employee Benefit Rights

Subtitle A — General Provisions

Sec. 1001. Congressional findings and declaration of policy.

Sec. 1002. Definitions.

Sec. *1003. Coverage.*

(a) Except as provided in subsection (b) of this section and in section 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by an employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by an employee organization . . . ; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a government plan . . . ;

(2) such plan is a church plan . . . ;

(3) such plan is maintained solely for . . . complying . . . workmen's compensation laws . . . ;

(4) such plan is maintained . . . for the benefit of . . . nonresident aliens; or

(5) such plan is an excess benefit plan . . . and is unfunded.

Subtitle B — Regulatory Provisions

Part 1 — Duty of disclosure reporting and disclosure

Sec. 1021. Duty of disclosure.

Sec. 1022. Plan description and summary plan description.

Sec. 1023. Annual reports.

Sec. 1024-1103. Filing, reporting, reports, etc.

Part 2 — Participation and vesting

Sec. 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(5) any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in section 736 of Title 26;

Sec. 1052. Minimum participation standards.

Sec. 1053. Minimum vesting standards.

Sec. 1054.-1061. Various provisions.

Part 3 — Funding

Sec. 1081. Coverage

This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title) other than—

(6) An agreement providing payments to a retired partner or deceased partner, or a deceased partner's successor in interest as described in section 736 of Title 26;

Part 4 — Fiduciary Responsibility

Sec. 1101. Coverage

(a) This part shall apply to an employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

Sec. 1102.-1114. Various provisions.

In summary, the structure of the act itself makes it clear that Congress intended partners to be covered as employees under Section 1003(a).

C. The legislative history shows that partner plans are covered by ERISA.

The legislative history of ERISA establishes that Congress did not intend ERISA to exclude partner retirement plans simply because they applied only to partners. The original bill concerning employee pension rights and protection that culminated in ERISA was H.R. 9232, 93d Cong., 1st Sess. (1973) (see Appendix C for pertinent parts of the bill). This bill and ERISA track word for word in many sections. Many of the sections bear the same number. In both the bill and ERISA the definition of "employee" is the same. ("The term 'employee' means any individual employed by an employer.")

Section 1003(b) of ERISA contains a list of exceptions from general ERISA coverage. The list includes plans such as those offered by churches and governments that were deemed inappropriate for regulation by ERISA.

Two of Section 1003(b)'s exceptions originally appeared in Section 201(b) of H.R. 9232, namely, the exception for governmental plans and the exception for plans maintained outside of the United States for nonresident aliens. In addition, Section 201(b) of the bill included the "select group" exception which now appears in other parts of ERISA.

An exception that originally appeared in Section 201(b) of the bill, but did *not* become part of ERISA, applied if:

> (2) such plan is established or maintained for the benefit of self-employed individual or *owner-employees* (as defined in section 401(c)(3) of the Internal Revenue Code of 1954.)[7] (emphasis added).

This exception, along with an exception for plans covering less than 25 participants, was later stricken from the bill and does not appear in ERISA as enacted.

The fact that an exception for self-employed and "owner-employee" plans was originally proposed, and that this exception was removed from the final version of the Act, indicates that Congress intended to include self-employed individuals and "owner-employees" such as partners in the general definition of "employee" that appears in 29 U.S.C. § 1002(6). Since ERISA tracks H.R. 9232, the dropping of the exception for self-employed persons and owners from the bill means that ERISA as enacted does cover self-employed individuals and owners such as partners.

D. The Court of Appeals based its Narrow Contruction of ERISA on a Faulty Assumption.

The Court of Appeals based its holding on the assumption that all partners have control and input into partnership matters and held that this is why Congress did not include them in ERISA.[8] This view of control and input of a partner was one

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[7] The reference to Section 401(c)(3) of the Internal Revenue Code is evidence that the key feature of employment is earned income.

[8] The Fifth Circuit below cited, for purposes of comparison, only one prior decision involving ERISA, *Schwartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985). In *Schwartz v. Gordon*, the Second Circuit held that an "employee benefit plan" under ERISA cannot include a plan consisting of one person who is a self-employed individual. While Petitioner does not agree with the *Schwartz* holding, it should be sufficient merely to note the contrast between the present controversy involving Alexander Grant & Company, a 300 person partnership having 2000 employees and the single person plan in *Schwartz*.

once held by Mr. Robertson, as he was taught this belief in school. Mr. Robertson continued to hold this belief when he was hired from a Big Eight accounting firm by Alexander Grant. He believed also that if he worked hard and got involved in management he could later retire and receive retirement benefits. Mr. Robertson did not know at the time Alexander Grant hired him that, in a national accounting partnership, a partner does *not* have an input into decision making, and that if he voiced ideas and thoughts as to the operation of the business contrary to those in power, he would be limited as to raises, positions, etc.

The Court of Appeals below erred when it assumed that all partners have such powers of input and control over the partnership affairs and thus have no need for ERISA. In fact, the interplay between the partnership agreement's covenant not to compete,[9] the threat of an injunction and costly litigation to defend against enforcement of the covenant, limited financial resources of a partner *and* loss of retirement benefits has created a form of bondage through intimidation for the partners of Alexander Grant and, we suggest, similar partnerships throughout the nation. The freedom of the individual as a partner to develop and determine his own destiny has in fact been limited by a few powerful men at Alexander Grant. All Petitioner is requesting is that he be granted a trial on the merits as to whether he was an "employee", as that term is used in ERISA.

E. Discrimination in Favor of Highly Compensated Employees is Prohibited.

The Internal Revenue Code (Title 26, U.S.C.) has for years held in Section 401(a)(4) that a retirement plan meets the requirements for favorable tax treatment if the contributions or benefits do not discriminate in favor of employees who are

[9] Article 25, Alexander Grant & Company General Partnership Agreement.

officers, shareholders, or highly compensated. Section 410 of the Internal Revenue Code states the minimum participation requirement of a qualified plan. The retirement plan cannot discriminate in favor of the highly compensated because Section 410 is subject to Section 401.

In discussing the relationship between ERISA and the Internal Revenue Code of 1954, the Labor Regulations in 29 C.F.R. § 2530.200a-2 provide that "Regulations prescribed by the Secretary of Treasury under Section 410 and 411 of the Code (relating to minimum standard for participation and vesting) shall apply for purposes of Section 202 and 204 of the Act (relating to minimum standards for participation and vesting under all plans, including nonqualified plans.) . . ." Thus, this regulation affirms the overlay of ERISA on existing provisions in connection with employee plans. In other words, a retirement plan cannot discriminate and exclude legally an employee if the employee meets the minimum requirements of 29 U.S.C. § 1053 of ERISA coverage. Since most of the secretaries, bookkeepers, clerks, staff accountants, senior accountants, supervisors, managers, principals and partners would meet these minimum participation and vesting standards, they are entitled to assert the benefits under the plan and Alexander Grant is prohibited from denying them their earned benefits.

CONCLUSION

This Court should grant this petition for writ of certiorari because:

(1) A large number of employees are wrongfully being excluded from participating in the retirement plan of partnerships. When Congress wanted to grant an employer complete immunity, it expressly did so. Congress did not expressly exempt partnerships and therefore partnerships are covered.

(2) The "partner" label applied to a large number of working personnel of partnerships should not be conclusive of the issue of whether the protections of ERISA are applicable.

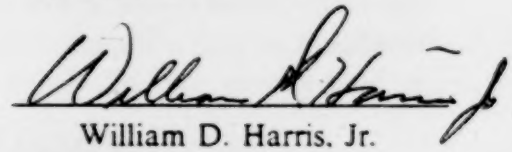
(3) ERISA is a statute that is important to the working people of this country. The definition of "employee" in ERISA should be construed in order that the administration of ERISA can proceed in an orderly manner.

(4) Unless the error of the lower courts is corrected, partnerships will be used as a tax shelter for retirement benefits for the few, leading to elimination of retirement plans that now cover employees.

(5) Freedom of the individual to work and to express his views is too precious to allow these rights to be limited by ones in power and control. Help to the helpless, hope to the hopeless and fairness to all is the strength of our system.

Respectfully submitted,

RICHARDS, HARRIS, MEDLOCK
& ANDREWS



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CERTIFICATE OF SERVICE

This will certify that three copies of the foregoing petition were mailed to respondents' counsel, first class mail, postage prepaid, this 11th day of December, 1986 addressed as follows: Mr. G. R. Poehner, Moore & Peterson, 2800 First City Center, Dallas, Texas, 75201.

William D. Harris, Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES W. ROBERTSON,
Plaintiff-Appellant,

v.

ALEXANDER GRANT & COMPANY, ETC., ET AL.,
Defendants-Appellees.

No. 85-1542

OPINION

Filed September 2, 1986

Before: Will Garwood and Robert M. Hill, Circuit Judges, and Martin L.C. Feldman*, District Judge.

Opinion by Judge Robert M. Hill

Appeal from the United States District Court
for the Northern District of Texas
Robert W. Porter, District Judge, Presiding

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* District Judge of the Eastern District of Louisiana, sitting by designation.

OPINION

ROBERT M. HILL, Circuit Judge:

We hold that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1461, is inapplicable to retirement plans covering only partners and, accordingly, affirm the district court's grant of summary judgment in favor of the defendants.

I.

After the plaintiff James Robertson worked for the defendant Alexander Grant & Company (Grant), a national accounting partnership, for six years, Grant admitted Robertson to the partnership in 1965. In the late 1970s a rift developed between Robertson, the department head of the tax section of Grant's Dallas office, and Larry Jobe, the managing partner of the Dallas office. Jobe thought that Robertson failed to aggressively seek new clients and to develop the tax section's practice; consequently, Jobe urged Robertson to step aside as department head while remaining as a partner of the firm. Robertson declined to step aside and apparently contacted the firm's national management about the matter. The national managing partner, Robert Kleckner, backed Jobe, and on January 23, 1979, Robertson ceased working at the firm. Robertson claims that he was "forced out" of the firm; the defendants maintain that Robertson voluntarily withdrew from the firm.

Several months after leaving the firm, Robertson wrote to Kleckner, requesting that the firm pay him his retirement benefits. The firm refused to pay Robertson any retirement benefits, asserting that, pursuant to the Grant partnership agreement, a partner who unilaterally withdraws from the firm is not entitled to retirement benefits. Robertson then sued Grant, Kleckner, and Jobe, and alleged that their actions violated ERISA; Robertson stated a state law breach of con-

tract action as well. The defendants responded and maintained that ERISA did not cover a retirement plan that applied only to partners and that, even if ERISA did apply to partnership retirement plans, two exceptions in ERISA excepted the Grant plan from coverage.

The district court granted judgment in the defendants' favor on the ERISA claim and dismissed the state law claim without prejudice. The court specifically held that ERISA did not apply to retirement plans covering only partners and that both exceptions urged by the defendants, the "section 736 exception"[1] and the "select group exception,"[2] also applied. Robertson appeals.

II.

On appeal, Robertson, as he must, challenges all three of the grounds relied on by the district court in granting the defendants' motion for summary judgment.[3] We however need only approve one of the grounds in order to affirm the district court's judgment. We find the judgment correct based on the first ground relied on by the district court; therefore, we do not address the second and third grounds given by the district court.

The first ground that the district court relied on in granting summary judgment was that ERISA does not apply to the Grant retirement plan because ERISA does not cover plans applicable only to partners and because the Grant plan covers only partners. In reaching its conclusion the court relied on the following regulations promulgated by the Secretary of Labor:

> Plans without employees.. For purposes of Title I of the Act and this chapter, the term "employee benefit

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[1] The section 736 exception is a shorthand reference to section 736 of the Internal Revenue Code, 26 U.S.C. § 736. Three sections of ERISA, sections 1021, 1051, and 1101, incorporate the description contained in section 736 to exempt certain payments to partners.

[2] The select group exception is a shorthand reference to the portion of section 1051 providing an exemption from ERISA's participation and vesting requirements to a plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

[3] Robertson also claims that the district court erred in not granting his motion for partial summary judgment. Robertson moved for summary judgment on the issue of whether the Grant retirement plan covered both partners and non-partners. Our disposition of Robertson's primary contentions on appeal also disposes of this issue.

> plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I.

29 C.F.R. § 2510.3-3(b) (1985) (emphasis added).

> A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. § 2510.3-3(c)(2) (1985). The district court was forced to turn to the Code of Federal Regulations for an answer to the question of whether ERISA applies to a plan covering only partners because the statute itself fails to provide an answer. The statute simply provides that it applies to "any employee benefit plan," 29 U.S.C. § 1003(a), and then provides the following circular definition of an employee: "The term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(b). Relying on the Secretary of Labor's pronouncements that ERISA does not apply to plans covering only partners and that partners are not employees, the district court held ERISA inapplicable to the Grant plan.

Robertson attacks the district court's ruling on two grounds. First, Robertson argues that the district court's reliance on the regulations is misplaced because the regulations conflict with the statute's legislative history and with the structure of the statute. Second, Robertson argues that the plan covered employees other than partners and that ERISA therefore applies.

A.

ERISA authorizes the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions" of the statute. 29 U.S.C. § 1135. Pursuant to this authorization the Secretary prescribed regulations eliminating plans covering only partners from the scope of ERISA. The regulations prescribed by the Secretary are "entitled to considerable deference, and we will uphold an interpretation that is reasonably defensible." *Sure-Tan, inc. v. National Labor Relations Board,* 467 U.S. 883, 891, 104 S.Ct. 2803, 2809, 81 L.Ed.2d 732, 742 (1984). If a regulation is "not inconsistent" with the legislative history, we will sustain it. *Lawrence County v. Lead-Deadwood School District,* No. 40-1, 469 U.S. 256, , 105 S.Ct. 695, , 83 L.Ed.2d 635, 641 (1985).

Robertson maintains that the regulations excluding partnership plans from ERISA coverage are inconsistent with the statute's legislative history. We disagree. One of the purposes of ERISA was to correct the abuses occurring in the management of pension plans that constitute the retirement benefits held in trust for workers in traditional employer-employee relationships. *See* S. Rep. No. 127, 93d Cong. 2d Sess. reprinted in 1974 U.S. Code cong. & Ad. News 4838, 4838-44; H.R. Rep. No. 533, 93d Cong., 2d Sess. reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4639-43. Employees in the traditional employer-employee relationship are more vulnerable than partners in a partnership are to abuses because workers typically lack control over pension plan management and input into the decision whether to extend pension benefits to certain employees. Cf. *Schwartz v. Gordon,* 761 F.2d 864, 868 (2d Cir. 1985). On the other hand, a partner has more control and input than does an employee since a partner has a vote in partnership affairs. Furthermore, a partnership contains a self-policing feature largely absent in the typical employer-employee relationship.

In the partnership situation the partners have an incentive not to agree to provisions that may harm certain members of the partnership because each partner knows that he could end up being the partner who is harmed. For example, while partners may want to discourage each other from withdrawing from the partnership, each partner has an incentive not to make the withdrawal provision too harsh since someday he might want to withdraw. On the other hand, the self-policing function is less strong in the typical employer-employee relationship. The employer wants to earn profit for himself or for the shareholders and has less incentive to treat the employees as fairly as a partner would treat his partners. Because of the difference between the partnership situation and the typical employer-employee relationship Congress easily may have intended only to regulate the latter relationship. Thus, we cannot say that the Secretary's regulations are inconsistent with the legislative history of ERISA. Additionally, Congress has twice amended ERISA's definitions sections since the statute's enactment, and in neither instance has Congress altered the definitions of employor or employee benefit plan, thereby adding weight to the Secretary's interpretation of the terms. *See Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 99 S.Ct. 505, 513, 58 L.Ed.2d 484, 495 (1978). Accordingly, we hold that ERISA is inapplicable to retirement plans covering only partners.

Robertson further maintains that the structure of ERISA indicates that Congress intended to make ERISA applicable to plans covering only partners. He points out that three of the regulatory provisions of the act, the sections on participation and vesting, funding, and fiduciary responsibility, 29 U.S.C. § 1051, 1081, and 1101, contain exemptions for "an agreement providing payments to a retired partner," while the section on reporting and disclosure, 29 U.S.C. § 1021, does not contain such an exemption. According to Robertson's view of the statute's structure, Congress would not have provided ex-

emptions from only a portion of ERISA's regulatory provisions had Congress not intended for ERISA to cover partnership plans. The Secretary of course, has, through his regulations, indicated a different interpretation of the statute.

We defer to the Secretary's view of the statute unless the "structure of the statute clearly reveal[s] a contrary intent on the part of Congress." *Chemical Manufacturers Association v. National Resources Defense Council, Inc.*, 470 U.S. , , 105 S.Ct. 1102, 84 L.Ed. 2d 90, 99 (1985). We find no such contrary intent indicated by the structure of the statute. The secretary easily could have decided that Congress intended to exempt payments to partners from plans covering both employees and partners. Under such a construction of the statute, an exemption from the reporting and disclosure section is unnecesary because a joint plan would have to be registered due to the participation of non-partners in the plan, and Congress did not need to provide an exemption from that section for payments to partners. Since the structure of the statute does not clearly reveal an intent contrary to the Secretary's view, we defer to his interpretation.

B.

Robertson's final assertion is that, even if ERISA is interpreted as not applying to plans covering only partners, ERISA applies to the Grant plan because the plan covers employees who are not partners. *See* 29 C.F.R. § 2510.3-3(b)(1985)("However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals. are participants covered under the plan, will be covered under Title I."). Specifically, Robertson asserts that the plan covers Grant employees known as "principals." Principals are employees of Grant who, while they are treated like partners and compensated like partners, are forbidden by state law from becoming partners because they are not Certified Public Accountants. He argues that, since the provisions of the

partners' retirement plan and the principals' retirement plan are nearly identical, the two separate plans are really one plan. Robertson's argument, however, misses the point. His argument ignores the fact that the plans, however similar, are two separate plans. The plan covering the partners does not pay any benefits to principals, and the plan covering principals does not pay any benefits to partners. Since the plans are separate, the plan covering partners covers only partners, and the district court correctly ruled that the plan does not cover employees other than partners.

Finding ERISA inapplicable to plans covering only partners, and finding that the Grant plan covered only partners, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES W. ROBERTSON,

v.

ALEXANDER GRANT & COMPANY, ET AL.

NO. CA3-81-2202-F

ORDER

Plaintiff, an ex-partner of Alexander Grant & Co. (Grant), brings this action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., seeking to collect retirement benefits. Plaintiff also seeks a declaratory judgment regarding retirement rights and benefits, 28 U.S.C. § 2201, and alleges a common law breach of contract claim under this Court's pendent jurisdiction. *See* Plaintiff's First Amended Complaint filed 4-23-82. Plaintiff was allowed to file an amended complaint after his original claim was dismissed for failure to plead a cause of action under ERISA. *See*, Order filed 3-4-82.

The essence of Plaintiff's amended argument is that Grant's partnership retirement plan is subject to ERISA because (a) partners are common-law "employees" within the meaning of the statute; and/or (b) the plan includes both partners and common-law employees and is thereby subject to ERISA. Therefore, Plaintiff concludes he has vested retirement benefits that, pursuant to ERISA, are not subject to forfeiture. Plaintiff also alleges he did not voluntarily withdraw but was "involuntarily retired" in order to deny him his retirement benefits now and in the future. Further, Plaintiff alleges Defendants Jobe and Kleckner acted arbitrarily and capriciously in granting retirement benefits to others who are involuntarily retired but denying them to Plaintiff.

Defendant Kleckner specially appeared and moved to dismiss for lack of subject matter jurisdiction and lack of *in personam* jurisdiction over himself, an Illinois resident.

Defendants Jobe and the Alexander Grant & Co. firm also moved to dismiss for lack of subject matter jurisdiction and have further filed a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure. Ruling on the motion was stayed, at Plaintiff's request, pending discovery.

On July 24, 1984, Plaintiff filed his opposition to the motion for summary judgment and, on July 25, filed his motion for partial summary judgment. Defendants have responded, and Plaintiff replied.

Because the Court has considered matters outside the pleadings, it will treat the motion to dismiss as blended with the one for summary judgment. Fed.R.Civ.P. 12(b). Having reviewed the pleadings, affidavits and depositions in support, the Court will grant Defendants' motion and deny Plaintiff's motion. The case will be dismissed without prejudice to Plaintiff asserting, in state court, his common law breach of contract claim.

Legal Standard. In order to be entitled to summary judgment, the movant must establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. The evidence and all factual inferences therefrom should be viewed in the light most favorable to the opponent and resolved against the movant. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective System, Inc.*, 669 F.2d 1026, 1030-31 (5th Cir. 1982).

However, the "possibility that a material fact *may* exist will not defeat the motion." Rather, the party opposing summary judgment must set forth specific facts, by affidavit or otherwise, establishing that there is a genuine dispute as to the true state of any material fact. *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2nd Cir. 1982). Mere allegations or denials in

the opponent's pleadings are insufficient to controvert a summary judgment motion supported by affidavit made on personal knowledge. Fed.R.Civ.P. 56(e).

The Issues. Simply stated, Defendants argue ERISA is not applicable because Plaintiff was a partner and party to the Grant Partnership Agreement (GPA). That uncontroverted material fact establishes, as a matter of law, the inapplicability of ERISA because (a) partners, by definition, are not employees as contemplated by the Act; and/or (b) payments to retired partners are specifically excluded from ERISA coverage. Without an ERISA claim, Defendants argue, no pendent jurisdiction exists to consider the alleged breach of contract thereby justifying summary judgment on that claim as well.

In opposition to Defendants' motion, and in support of his own motion for partial summary judgment, Plaintiff argues that based on economic realities, Plaintiff *is* an employee a defined in ERISA; and the Grant Retirement Plan *is* subject to ERISA because it covers both partners and common law employees (principals). Moreover, Plaintiff argues the "select group" and Section 736 exceptions do not negate ERISA's application to Plaintiff's retirement rights.

Analysis. ERISA is social welfare legislation which, through its definitions and the regulations promulgated by the Department of Labor, expressly excludes partners such as Plaintiff from its provisions. It is axiomatic that an "Employee Benefit Plan" subject to ERISA regulations, must have "employees". 29 U.S.C. § 1003(a); 29 C.F.R. § 2510.33(b). The term, employee, is defined as "any individual employed by an employer," 29 U.S.C. § 1002(6). While Plaintiff urges the Court to interpret this definition broadly to include partners who work for very large partnerships, the Court declines. Instead, the Court will accept and apply the definition of employee articulated in the regulations promulgated by the Secretary of Labor — who was the responsibility for administering the statute. The regulations clearly and unequivocably

state: "a partner in a partnership . . . is not an employee of the partnership." 29 C.F.R. § 2510.3-3(c)(2). *See* Order of March 4, 1982. Neither the statute, regulations or any case cited by Plaintiff apply ERISA to a partnership plan simply because the firm reaches a certain size. The record clearly demonstrates partners entered separate contracts with Grant, shared in the profits and losses of the firm, were intended as legally separate from employees — and so acted. Plaintiff himself recognized the distinction as he stated in a letter to Mr. Kleckner, "I was a employee for six years and a partner for the last thirteen. . ." (Plaintiff letter to Kleckner dated May 7, 1979). Unlike Plaintiff's cases regarding tax or employment discrimination settings, the legal realities here compel the Court to conclude Plaintiff was a partner of a partnership whose agreement was beyond the purview of ERISA.

Plaintiff was allowed to amend his complaint to argue the Grant plan covered both partners and common law employees, principals, becoming a joint plan within the scope of ERISA. 29 C.F.R. §2510.3-3(b). The Court disagrees. Grant intended, and succeeded, in creating separate and distinct retirement plans for its principals and partners. Notwithstanding the identity of some retirement provisions in the Principal's Agreement and the General Partnership Agreement, the two groups are separate legal classifications. Neither could lay claim to benefits under the other's plan. Moreover, assuming *arguendo* a joint plan existed, each group falls within recognized exceptions to ERISA coverage.

Principals are upper-management personnel who cannot legally become partners because they are not licensed as CPA's. In a firm of 2,300 people, of whom 300 are partners, only 20 are principals. (Pollock affidavit at ¶13). They are few in number and highly compensated. (Id). As such, principals fit squarely within the "select group" exception which states ERISA does *not* apply to "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred

compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2).

The "Select Group" exception also covers the partner members of Plaintiff's alleged joint plan because they, too, are few in number, highly compensated and solely responsible for the management of the firm. Additionally, the retirement provisions for partners fall within another exception to ERISA.

Payments to partners liquidating their partnership interest as described in Section 736 of the Internal Revenue Code are also excluded from ERISA. 29 U.S.C. § 1051(5). Section 736 merely instructs the former partner how to characterize retirement payments for income tax purposes. When a partner ceases to be a partner of the firm, payments made by Grant are governed by Article 17, Paragraph 17.1 of the GPA. Those payments, no matter how characterized, fit squarely within the meaning of Section 736. Based on the foregoing, Plaintiff's "joint plan" argument has failed to state a claim under ERISA.

Plaintiff's retirement rights are governed by the general partnership agreement, to which he is a party, not ERISA. His rights under that agreement turn on whether Plaintiff was "involuntarily retired" or "unilaterally withdrew" from the partnership. Plaintiff also seeks to show Defendant Kleckner and Jobe breached their fiduciary duty to Plaintiff and acted arbitrarily and capriciously in forfeiting his retirement benefits. These issues all arise under Plaintiff's breach of contract claim which is only before the Court as a pendent state claim. Because the Court is compelled to conclude no federal cause of action exists, and absent an independent basis for federal jurisdiction, it cannot exercise pendent jurisdiction. Accordingly, that claim will be dismissed, without prejudice to Plaintiff proceeding in state court. Based on the foregoing it is hereby

ORDERED that Defendants' motion for summary judgment is GRANTED and this case is dismissed without prejudice to Plaintiff refiling his pendent claims in state court. It is further

ORDERED that Plaintiff's motion for partial summary judgment is DENIED. Each party shall bear their own costs.

Signed and entered this 7th day of August, 1985.

/s/ ROBERT W. PORTER

Robert W. Porter
United States District Judge

APPENDIX B

26 U.S.C. § 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification. —A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

• • •

(4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—

(A) officers,

(B) shareholders, or

(C) highly compensated.

For purposes of this paragraph, there shall be excluded from consideration employees described in section 410(b)(3)(A) and (C).

• • •

(c) Definitions and rules relating to self-employed individuals and owner-employees. —For purposes of this section—

(1) Self-employed individual treated as employee.—

(A) In general. —The term "employee" includes, for any taxable year, an individual who is a self-employeed individual for such taxable year.

(B) Self-employed individual. —The term "self-employed individual" means, with respect to any taxable year, an individual who has earned income (as defined in paragraph (2)) for such taxable year.

26 U.S.C. § 704. Partner's distributive share

(a) Effect of partnership agreement. —A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this chapter, be determined by the partnership agreement.

• • •

26 U.S.C. § 707. Transactions between partner and partnership

(a) Partner not acting in capacity as partner. —If a partner engages in a transaction with a partnership other than in his capacity as a member of such partnership, the transaction shall, except as otherwise provided in this section, be considered as occurring between the partnership and one who is not a partner.

• • •

26 U.S.C. § 736. Payments to a retiring partner or a deceased partner's successor in interest

(a) Payments considered as distributive share or guaranteed payment. —Payments made in liquidation of the interest of a retiring partner or a deceased partner shall, except as provided in subsection (b), be considered—

(1) as a distributive share to the recipient of partnership income if the amount thereof is determined with regard to the income of the partnership, or

(2) as a guaranteed payment described in section 707(c) if the amount thereof is determined without regard to the income of the partnership.

(b) Payments for interest in partnership.—

(1) General rule. —Payments made in liquidation of the interest of a retiring partner or a deceased partner

shall, to the extent such payments (other than payments described in paragraph (2)) are determined, under regulations prescribed by the Secretary, to be made in exchange for the interest of such partner in partnership property, be considered as a distribution by the partnership and not as a distributive share or guaranteed payment under subsection (a).

(2) Special rules. —For purposes of this subsection, payments in exchange for an interest in partnership property shall not include amounts paid for—

(A) unrealized receivables of the partnership (as defined in section 751(c)), or

(B) good will of the partnership, except to the extent that the partnership agreement provides for a payment with respect to good will.

(c) Cross reference.—

For limitation on the tax attributable to certain gain connected with section 1248 stock, see section 751(e).

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of

their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desireable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadeqauacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for

fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee orginaization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

* * *

29 U.S.C. § 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(933) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

29 U.S.C. § 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

* * *

(5) any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in section 736 of Title 26;

* * *

29 U.S.C. § 1081. Coverage

(a) Plans excepted from applicablity of this part

This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than—

* * *

(6) an agreement providing such payments to a retired partner or deceased partner's successor in interest as described in section 736 of Title 26;

* * *

29 U.S.C. § 1101. Coverage

(a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than—

* * *

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

* * *

29 C.F.R. § 2510.3-3 Employee benefit plan.

(a) * * *

(b) *Plans without employees.* For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a socalled "Keogh" or "H.R. 10" plan under which only partners are only a sole proprietor are participants covered under the plan will

not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

(c) *Employees.* For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner is a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

29 C.F.R. § 2530.200a-2 Treasury regulations for purposes of the Act.

Regulations prescribed by the Secretary of the Treasury or his delegate under sections 410 and 411 of the Code (relating to minimum standards for participation and vesting) shall apply for purposes of sections 202 through 204 of the Act. Thus, except for those provisions (such as the definition of an hour of service or a year of service) for which authority to prescribe regulations is specifically delegated to the Secretary of Labor, regulations prescribed by the Secretary of the Treasury shall also be used to implement the related provisions contained in the Act. Those regulations specify the credit that must be given to an employee for years of service and years of participation completed by the employee. The allocation of regulatory jurisdiction between the Secretary of Treasury of his delegate and the Sectretary of Labor is governed by Titles I through III of the Act. See section 3002 of the Act (88 Stat. 996).

APPENDIX C

93D CONGRESS 1ST SESSION

H.R. 9232

IN THE HOUSE OF REPRESENTATIVES

July 12, 1973

A BILL

To revise the Welfare and Pension Plans Disclosure Act, and to Strengthen and improve the private retirement system by establishing minimum standards for participation in and for vesting of benefits under pension and profit-sharing retirement plans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SHORT TITLE

SECTION 1. This Act may be cited as the "Multi-protection of Employee Retirement Income and Trust Act".

* * *

(11) The term "employee" means any individual employed by an employer.

* * *

TITLE II — VESTING AND ELIGIBILITY REQUIREMENTS

SEC. 201.

* * *

(b) This title shall not apply to any employee pension benefit plan if—

(1) plan is administered by the Federal Government or by an agency of instrumentality of the Federal Government:

(2) such plan is established or maintained for the benefit of self-employed individuals or owner-employees (as defined in section 401(c)(3) of the Internal Revenue Code of 1954):

(3) such plan covers not more than twenty-five participants;

(4) such plan is established or maintained outside the United States primarily for the benefit of employees who are not citizens of the United States and the situs of the employee benefit plan fund established or maintained pursuant to such plan is maintained outside the United States;

(5) such plan is unfunded and is established or maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management employees, and is declared by the employer as not intended to meet the requirements of section 401(a) of the Internal Revenue Code of 1954.

* * *

Supreme Court, U.S.
FILED
JAN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. ROBERTSON,

Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
ROBERT A. KLECKNER
AND LARRY A. JOBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Employee Retirement Income Security Act of 1974 preclude a general partnership from including in its partnership agreement provisions that permit partners to retire at a specific age and to continue to share in the profits of the partnership for a ten-year period following their retirement but denying such profit-sharing rights to partners who withdraw from the partnership prior to retirement age?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are the petitioner James W. Robertson and the respondents Alexander Grant & Company (now known as Grant Thornton), Robert A. Kleckner and Larry A. Jobe.

The list of parties to the proceedings below is identical to the list of parties to this proceeding.

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No. 86-971

IN THE

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OCTOBER TERM, 1986

JAMES W. ROBERTSON,

Petitioner,

vs.

ALEXANDER GRANT & COMPANY,
ROBERT A. KLECKNER
AND LARRY A. JOBE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Alexander Grant & Company, Robert A. Kleckner, and Larry A. Jobe respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 798 F.2d 868 (1986).

STATEMENT OF THE CASE

The respondents incorporate by reference the statement of the facts in the opinion below at 798 F.2d at 869.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is a straightforward interpretation of a simply worded statute that is consistent with the Secretary of Labor's interpretation and is, in all respects, correct.

The Employee Retirement Income Security Act of 1974 ("ERISA") provides that it is applicable to "any employee benefit plan." 29 U.S.C. § 1003. The definition section of ERISA provides the following circular definition of an employee: "The term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(b). Both the District Court and the Court of Appeals turned to regulations promulgated by the Secretary of Labor pursuant to authority granted by ERISA, 29 U.S.C. § 1135, for further illumination concerning the meaning of the terms "employee benefit plan" and "employee." Those regulations provide that "plan[s] under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I," 29 C.F.R. § 2510.3-3(b) (1985), and "a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership," 29 C.F.R. § 2510.3-3(c)(2) (1985). The Court of Appeals held that these regulatory interpretations of ERISA were valid and upheld the District Court's conclusion that the Alexander Grant & Company ("Grant") partnership agreement applies only to partners so that it is not covered by ERISA. 798 F.2d 870-72. The lower Court's interpretation of ERISA was thus straightforward and correct and the Petition for Certiorari should be denied.

2. The decision below does not conflict with decisions of other courts of appeal, does not conflict with a state court of last resort, has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has not decided an important question of federal law which has not been settled by this Court.

The Petition cites no decisions by other courts of appeal that are in conflict with the decision of the Court below. The Petition also cites no decisions of state courts of last resort that

are in conflict with the decision below. The reason for this is simple: There are none.

The Petition also does not quarrel with the course of judicial proceedings in either the Court of Appeals or the District Court. That the matter of law that was dealt with below is not of public significance is demonstrated by the fact that in the twelve years since the adoption of ERISA, there has not been a single case in the entire federal court system seeking to apply ERISA to a partnership retirement plan contained exclusively in the general partnership agreement and that thus covers only partners. The Petition for Certiorari should be denied.

3. The decision below is consistent with the policy and objectives of ERISA.

The Petition for Certiorari in this matter, at pages 5 through 6, suggests that the opinion below held that any retirement plan adopted by a partnership was exempt from ERISA's protection. That suggestion is groundless. The Court of Appeals specifically held:

> We find the judgment correct based on the first ground relied on by the district court; therefore, we do not address the second and third grounds given by the district court .... The first ground that the district court relied on in granting summary judgment is that ERISA does not apply to the Grant retirement plan because ERISA does not cover plans applicable only to partners and because the Grant plan covers only partners.

798 F.2d 869. Thus, the decision of the Court below was narrowly limited and held only that plans that covered only partners in a partnership and did not cover any employees were exempt from ERISA's coverage. The opinion below will not support the inference the petitioner seeks to suggest by asking the rhetorical question "Why should Congress just want to cover corporate retirement plans?" Petition at 5. On the contrary, the Court below affirmed the District Court's decision

in reliance upon a regulation adopted by the Secretary of Labor, 29 C.F.R. § 2510.3-3(b) (1985), that includes the statement:

> However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I.

Thus, under the regulations interpreting ERISA, any of the 1,514,212 partnerships that filed tax returns in 1982 (Petition at 5) and that had a retirement plan covering even one common law employee were subject to ERISA coverage. Under the opinion below, the policy and objectives of ERISA are fully preserved.

4. The structure of ERISA does not indicate that "partners" are "employees" under ERISA and thus that their retirement plans are covered by ERISA.

The petitioner argues that because ERISA specifically excludes certain types of payments made by employee benefit plans to partners from the participation and vesting, funding, and fiduciary responsibility provisions of ERISA, plans that cover only partners must be generally covered by ERISA. Petition at 6-10. The types of payments excluded from those provisions are payments "described in section 736" of the Internal Revenue Code, 26 U.S.C. § 736. 29 U.S.C. §§ 1051, 1081, 1101. It is, however, entirely possible that a plan covering both employees and partners could make payments to partners that are described in section 736 of the Internal Revenue Code and that Congress intended such payments to be exempt from the vesting, funding, and fiduciary responsibility provisions of ERISA, and that the same plan could provide for payments to partners that are not described in section 736 but that Congress did not intend those payments to be exempt from those provisions. It is equally possible, as the Court of Appeals noted, that

> the secretary easily could have decided that Congress intended to exempt payments to partners from plans covering both employees and partners. Under such a construction of the statute, an exemption from the reporting and disclosure section is unnecessary because a joint plan would have to be registered due to the participation of non-partners in the plan and Congress did not need to provide an exemption from that section for payments to partners.

798 F.2d at 871. Thus, the structure of ERISA does not indicate that "partners" are "employees" under ERISA and that retirement plans covering only partners are covered by ERISA.

5. The legislative history of ERISA does not demonstrate that plans covering only partners are covered by ERISA.

The petitioner urges this Court to conclude, contrary to the conclusion of the Secretary of Labor, that Congress intended ERISA to cover self-employed individuals and owner-employees, such as partners, in the general definition of employee as a result of the elimination from an earlier draft of ERISA of an exception for self-employed individuals or owner-employees in the list of exceptions from general ERISA coverage now contained in section 1003(b) of ERISA. Petition at 10-11. The elimination of that provision, however, is equally explained by Congress' belief that the self-employed individual or owner-employee exclusions was not necessary in light of the definition of "employee" contained in the definition section of ERISA: "The term 'employee' means any individual employed by an employer." 29 U.S.C. § 1002(b). The common sense definition of the word does not include partners.

Moreover, the interpretative regulations of the Secretary of Labor are entitled to great deference, *Sure-Tan, Inc. v. National Labor Relations Board,* 467 U.S. 833 (1984), and if they are "not inconsistent" with the legislative history, the courts will sustain them, *Lawrence County v. Lead-Deadwood School Dis-*

trict No. 40-1, 469 U.S. 256 (1985). This deference to the Secretary of Labor's interpretation is particularly enhanced, inasmuch as Congress has twice amended ERISA's definitions sections since the statute's enactment and in neither instance has Congress altered the definition of "employee" or "employee benefit plan." *See Board of Governors v. First Lincolnwood Corp.,* 439 U.S. 234 (1978). In short, the legislative history of ERISA does not suggest that the decision of the Court below was erroneous.

6. The Court of Appeals did not base its construction of ERISA on a faulty factual assumption.

The petitioner contends that the Court of Appeals based its decision upon the faulty factual assumption that the petitioner was a partner in Grant. At a time before this litigation was pending, however, the petitioner himself recognized the distinction between employees and partners and that the distinction was applicable to his position at Grant. In a letter the petitioner wrote to the respondent Kleckner on May 7, 1979, the petitioner stated, "I was a employee for six years and a partner for the last thirteen . . . ." Petition at A12. As a partner, the petitioner had all of the rights to participate in the management of the partnership secured to him by the partnership agreement, as well as the right to participate in its profits. He also had all of the rights that were secured to him by the Uniform Partnership Act except to the extent that they were limited by the partnership agreement. Those rights were considerably greater than the rights that are available to common law employees. The decision of the Court of Appeals was not based upon a faulty factual assumption.

7. The discrimination, if any, in favor of highly compensated "employees" in the Grant partnership agreement is not prohibited.

The petitioner argues that under section 401(a)(4) and section 410 of the Internal Revenue Code, 26 U.S.C. §§ 401(a)(4), 410, the Grant partnership agreement cannot discriminate in favor of Grant's partners and against others. It should be noted, however, that sections 401(a)(4) and 410 are applicable only to plans that are qualified for favorable tax treatment and the Grant partnership agreement is not such a plan.

The petitioner also argues that because a regulation adopted by the Secretary of Labor under ERISA provides that regulations prescribed by the Secretary of the Treasury under sections 410 and 411 of the Internal Revenue Code are applicable for purposes of sections 202 and 204 of ERISA (29 U.S.C. §§ 1054, 1056), no retirement plan of any type can exclude an employee if the employee meets the minimum requirements of ERISA coverage provided by 29 U.S.C. § 1053. The argument is specious inasmuch as sections 202 and 204 of ERISA are applicable only to "employee benefit plans" and the Grant partnership agreement is not an "employee benefit plan." 29 C.F.R. §§ 2510.3-3(b), 2510.3-3(c)(2) (1985). Thus, if there is discrimination in the Grant partnership agreement, it is a discrimination that is not prohibited by the Internal Revenue Code, ERISA, Treasury regulations adopted under the Internal Revenue Code, or Labor Department regulations adopted under ERISA.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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